



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2054 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 13<sup>th</sup> December 2017)**

**BISHOP BAKARI KEA.....CLAIMANT**

**VERSUS**

**THE EVANGELICAL LUTHERAN CHURCH IN KENYA (ELCK) Through ARCH-BISHOP**

**RT. REV. DR WALTER OBARE OMWANZA.....1<sup>ST</sup> DEFENDANT**

**REV. BENJAMIN LEMOSI.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MUCHIRI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Claimant herein first filed his Complaint in HCCC Case No. 2015/2013 at the Milimani Law Courts and was handled by J. Onyancha in Chambers. The Hon Judge perused the file and determined that this matter be referred to the Employment and Labour Relations Court for hearing and determination. When the case came before this Court it was registered as Employment and Labour Relations Court Case No. 2054/2013.
2. In the Complaint herein the Claimant has indicated that at all material times, he was the Bishop of ELCK Central Diocese.
3. That on or about 9<sup>th</sup> December 2013, he received a letter from the Ag. Secretary General ELCK forwarded to him as undated letter apparently from Namanga and Gatimbi Parishes referred to "Special General Meeting".
4. Attached to the said letter were annexures which included an alleged list of parishioners from Gatimbi and Namanga Parishes who were allegedly the authors of the undated letter forwarded by the Ag. Secretary General ELCK.
5. The said Parishioners purported to convene a meeting allegedly to discuss the Leadership and conduct of the Plaintiff without any ELCK constitutional mandate.
6. That despite the constitutional issues, being raised, the Parishioners proceeded with the unconstitutional and illegal meeting on 16<sup>th</sup> December 2013. At the said meeting in which the Ag. Secretary General of ELCK was in attendance, it was announced that the Plaintiff had been suspended by an Executive Committee on an undisclosed date and that one John Kispan was slated to be installed as

Bishop ELCK Central Diocese.

7. The Plaintiff states that the alleged suspension came as a shock to him as he was infact unaware and/or uniformed of any disciplinary action that had been leveled against him save for the undated letter forwarded by the Secretary General.

8. The Plaintiff avers that in any event, the Executive Committee did not have the ELCK constitutional mandate to act as it did and its actions were ultra vires.

9. The Plaintiff sought the following prayers:

***a. A declaration that the rules of natural justice have been breached as against the Plaintiff Claimant herein.***

***b. A declaration that the meeting of 16<sup>th</sup> December, 2013, and any other meeting flowing therefrom, and any consequent decisions or resolutions flowing therefrom are unconstitutional, null and void.***

***c. An order that the dispute resolution mechanism as set out in the ELCK constitution be followed.***

***d. A declaration that Bishop Bakari Kea is the Bishop of ELCK-Central Diocese.***

***e. A permanent injunction restraining the Defendants Respondents jointly and severally by themselves, their organs structures, agents or otherwise from implementing any decisions and/or resolutions that were reached and/or passed on the 16<sup>th</sup> day of December, and any other meeting flowing therefrom that has the effect of suspending, ousting or in any other way interfering with the position of Bakari Kea as Bishop of ELCK – Central Diocese.***

***f. A permanent injunction restraining the Defendants Respondents jointly and severally by themselves, their organs structures, agents or otherwise from exercising any powers vested in the Diocesan officials of ELCK – Central Diocese.***

***g. A permanent injunction restraining the Defendants Respondents jointly and severally by themselves, their organs structures, agents or otherwise from installing any person as Bishop of ELCK – Central Diocese except where the Bishops office falls vacant as per the Constitution.***

***h. An order that the Respondent does pay the entire salary due and owing to the Claimant since May 2014 to the date of Judgement plus interest at Court rates.***

***i. Costs of the suit***

10. The Respondents herein appointed Prof Tom Ojienda and Associates as their Counsel on 5<sup>th</sup> June 2014 who filed his notice of appointment on the same date.

11. In the meantime, the Claimant was beset with many interlocutory applications which prompted Hon. J. Onyacha to order that the parties should consider to stay all applications and proceed with the main claim.

12. The parties appeared before this Court on 5<sup>th</sup> May 2016 and I made orders staying all applications and directed that the main claim be set down for hearing and all issues being raised in the applications be raised in the said claim.

13. In the meantime, the Respondent who had never filed their defence was directed to do so within 14 days. The Respondents finally filed their defence on 7<sup>th</sup> June 2017 through the firm of Otieno Ochich

Associates Advocates.

14. The Defendant denies allegations of the Plaintiff as per paragraph 3 of the Plaintiff was Bishop ELCK – Central Diocese.
15. The Defendants aver that by a letter dated 9<sup>th</sup> December 2013, the 2<sup>nd</sup> Defendant invited the Plaintiff for a meeting to discuss a demand for a Special Diocesan, General Meeting of the Church's Central Diocese. A copy of the demand which had also been addressed to the Plaintiff together with an annexed list of signatories was also forwarded with the said letter.
16. The Respondents deny ever holding an illegal meeting on 16<sup>th</sup> December 2013 which announced the suspension of the Claimant.
17. The Respondent avers that the Diocesan Central meeting is the Principal Legislative and over Policy making organ of the Diocese with powers to undertake elections to consider and taken actions on reports received from Parishes and to transact any other business and determine any other matters referred to it in accordance with the Constitution of the Church.
18. They aver that the Diocesan General Meeting has the power under the Constitution of the Church to elect, discipline and remove a Diocesan Bishop from office. They aver that the aforesaid letter demanding for the Special Diocesan meeting was authored by named members of the Central Diocese some of whom indicated their cell phone numbers. That the letter was not authored by Parishioners as alleged by the Claimant.
19. The Respondents deny allegations that the Claimant was suspended from his office as alleged in paragraph 8, 9 and 11 of the Plaintiff.
20. The Respondent avers that the Diocesan General Meeting was commencing from 17<sup>th</sup> December 2013 merely as a fall back meeting that was to take place only in the event that the claimant and Ag. Diocesan Secretary failed to convene the meeting.
21. The Respondent aver further that the Claimant was accorded natural justice as the demand for the Special General Meeting aforesaid invited the Claimant to attend the meeting so that the accusations against him could be deliberated in his presence and so that he could also address the meeting and make his defence.
22. The Respondents aver that contrary to the Claimant's allegation that he had not been subject to any disciplinary process that the Claimant had a strained relationship with members of the Central diocese as detailed in the annexures to the aforesaid demand for Special Diocesan General Meeting.
23. The Respondent aver that the meeting of 17<sup>th</sup> December 2013 was evidently exclusively a meeting of Central Diocese and the Church's National Office or officials had nothing to do with the resolutions of that meeting and the said National Office had not at all pursued the outcome of that meeting.
24. The Respondents also aver that the responsibility to set into motion the dispute resolution mechanism under the constitution of the Evangelical Lutheran Church in Kenya falls under the Party that feels aggrieved. Thus, it was the Claimant and no other Party to set the dispute resolution mechanism in motion.
25. The Respondents aver that persons listed as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been wrongly joined as Defendants in this suit and their names ought to be expunged from the record. They also aver that the suit and prayers herein have been overtaken by events and cannot be granted. They also contest the jurisdiction of this Court.
26. On 28<sup>th</sup> June 2017, in the presence of both Counsels, this Court set the hearing of this suit on 27<sup>th</sup> July

2017.

27. On 27<sup>th</sup> July 2017 the Respondents failed to attend. In their absence the Court ordered the case to proceed undefended. The Claimant indicated he wished to proceed to file submissions without calling any evidence. The Court allowed this application and ordered that submissions be filed within 21 days.

28. Since the Respondent had filed their defence, which is on record, I will consider both the averments in the defence and in the Plaintiff and the submissions filed herein in reaching my decision in the matter.

29. In deciding this matter, the issues for determination as re follows:-

- 1. Whether this Court has jurisdiction to handle this matter.**
- 2. Whether the Respondents are properly enjoined in this matter.**
- 3. Whether the claimant was properly removed as Bishop ELCK as alleged.**
- 4. What remedies to grant in the circumstances.**

30. On the 1<sup>st</sup> issue, the issue of this Court's jurisdiction was the subject of an interlocutory application filed through a Preliminary Objection filed in Court dated 27<sup>th</sup> December 2013. This Preliminary Objection was considered by Hon. J. Onyango and she rendered her ruling on 12<sup>th</sup> February 2014 dismissing the Preliminary Objection. Since J. Onyango and this Court is of competent jurisdiction, I would uphold the position taken by my sister Judge and affirm that indeed this Court has jurisdiction to handle this matter having been transferred from the High court to this Court for hearing and disposal.

31. Indeed the parties submitted to the Court's jurisdiction and have constantly and regularly filed and defended other applications before this Court. The contention that this Court has no jurisdiction is therefore overruled.

32. On the issue of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> persons mentioned as Respondents being wrongfully enjoined in this case; in determining this issue, I note that the persons named as Respondents herein are the officials of the Evangelical Lutheran Church in Kenya (ELCK) who are the Arch Bishop, Ag. Secretary General and Treasurer respectively. The Claimant on his part has stated that he is a Bishop of ELCK Central Diocese.

33. The Respondents (ELCK) being a Society registered under the Societies Act, I note that the Societies Act does not contain provisions with regard to the prosecution and presentation of suits against unincorporated Societies. Thus as held by Bosire J (as he then was) in **John Ottenyo Amwayi & 2 Others v. Rev George Abura & 2 Others**. Court of Appeal No. 6339/1990 the Legislature did not intend that submissions be brought by or against those Societies in their names.

34. The same position was held by my learned brother Mwita J in High Court at Kakamega Court case No. 299 of 2013 **African Orthodox Church of Kenya vs. Rev Charles Omuroka & Another** where he upheld a Preliminary Objection raised in relation to the suit filed against the 2<sup>nd</sup> Respondent Church herein.

35. In the instant case, I note the Defendants so named are sued as officials of the Respondent ELCK. This is the proper way of instituting suit against a registered Society as per the law.

36. The contention by the named ELCK officials that they are wrongly enjoined in this case has no basis and is rejected.

37. On the 3<sup>rd</sup> issue, the chronology of events that necessitated this case show that the Claimant was Bishop, Central Diocese Nairobi on 9<sup>th</sup> December 2013, he received a letter from Ag. General Secretary

ELCK Mr. Benjamin Lemosi forwarding some undated documents demanding for a special general meeting of the Diocese. The letter raised some grievances by some persons who stated that they were members of the Central diocese of ELCK.

38. The alleged members demanded action failure of which they were to have a special meeting on Monday 16<sup>th</sup> December 2013 at Maendeleo Park. The demand was purportedly copied to the Claimant and he was requested to attend so that they could deliberate on issues in his presence and he be allowed to address the meeting on this complaints and make his defence.

39. The letter had a list of names with some signed and other unsigned. The Claimant responded to the letter of 9<sup>th</sup> December 2013 vide one dated 11<sup>th</sup> December 2013, which was delivered to the head office and he indicated that this was the first time he was seeing the forwarded demand. He also raised his concern that the ELCK Constitution was being violated. He further indicated his inability to attend the meeting as requested due to official duties.

40. On 28<sup>th</sup> April 2014 the Claimant was served with a letter defrocking him and which stated as follows:-

***“... further to the letter dated 9<sup>th</sup> December 2013, on the above subject, the Executive Committee (ExCom) of the Evangelical Lutheran Church in Kenya has noted that you have no response or you have no intention of responding to the issues that have been raised against you.***

***In the pemies, the Executive Committee (ExCom) painfully but unanimously decided to defrock you from the office of the Ministry and Evangelism and thereby directed me to convey to you, which I hereby do, the decision that you are defrocked as a Pastor with effect from the date 24<sup>th</sup> April 2014”.***

41. In this respect, what the Court needs to consider is whether due process was followed before the Claimant was defrocked.

42. Section 13 of the ELCK Constitution outlines the composition of the Diocesan General meeting which is as follows:-

***1. Three officials of the Diocese (the Bishop, Secretary and Treasurer.***

***2. Members of the Diocesan Council.***

***3. Retired Bishops of the Diocese.***

***4. All the Pastors in the Parishes and Diocese.***

***5. Three lay persons elected by each Parish in the Diocese, one of whom must be a youth, a woman and an elder.***

***6. One lay person not being a youth nor a member of the congregational Elders Council, elected by each Parish.***

***7. One Deaconess elected by each Parish.***

***8. One Evangelist elected by the Evangelists from each Parish.***

***9. The Diocesan Development Coordinators, one representing each of the Diocesan Development Boards.***

***10. The Development Coordinators of each Parish in the Diocese.***

**11. The Diocesan Council may invite not more than five other persons who shall not have voting powers.**

43. The powers of the Diocesan General Meeting are set out under Section 14 of the ELCK Constitution as follows:

**a) The principal legislative organ of the Diocese with the power to make and amend Diocesan bylaws.**

**b) To receive, hear and determine appeals arising out of the decisions of the Parish and Diocesan Councils.**

**c) Is the overall policy making organ of the Diocese.**

**d) It shall have the power to associate and enter into partnerships with minimum partners and other bodies, organizations and institutions at the Diocesan level”.**

44. Section 23 of the ELCK Constitution states under which circumstances the office of the Diocesan Bishop can become vacant:-

**“the office of the Diocesan Bishop shall become vacant upon death, retirement, resignation or upon the Bishop being removed by the Diocesan general meeting for heresy, violation of the Constitution or incapacitation which in the opinion of the Diocesan General meeting renders him incapable of discharging the functions of the office or for any other legitimate cause or upon the Diocesan Bishop being elected to the office of the Arch- Bishop. Diocesan Bishop is liable to be removed from office if the Diocesan general meeting makes a disciplinary decision that renders him unsuitable to remain in the office of the Bishop”... (emphasis is mine).**

45. The above provision sets out clearly how a bishop of a Diocese can be removed. Indeed the members to constitute the Diocese General Meeting is set. It is however apparent that the meeting called on 16<sup>th</sup> December 2013 was called by members of the Parish (Parishioners) as per the list of attendees. These people could not constitute a Diocese General Meeting as per the ELCK Constitution.

46. As to the actual discipline process of the ELCK, the same is set out under Article XXII of the ELCK Constitution entitled Church Discipline. This is what is provided:-

“.....

**6) Before the process of discipline may resume, it must be certified that all efforts to resolve the conflict/dispute within the relevant Church organs have failed.**

**7) There must be a complainant and the person accused should be given the right to be heard in his defence within the relevant forum as provided within this Constitution.**

**8) A member charged with an offence shall appear before the relevant body. A written notice specifying the exact charges that have been made against the member shall be sent to the member at least 14 days prior to the meeting.**

**9) Upon hearing the complaints/allegations, the committee shall proceed to hear the accused on his defence.**

.....  
.....

**17) (b) the disciplinary committee of a Diocesan Bishop**

***shall consist of not less than 3 and not more than 9 persons of high integrity elected by the Diocesan Council from its body, one-third of who must be persons who have previously been elected to or who possess the qualifications for election to the office of the Diocesan Bishop in accordance with this Constitution”.***

47. As stated above, the disciplinary process – if any subjected to the Claimant did not follow the Church Constitution and I therefore find that the Claimant was not subjected to due process before he was defrocked.

48. The Claimant’s case to this Court seeking reliefs under Certificate of Urgency vide an order given by Hon. J. Rika, the Respondents were barred from proceeding against the claimant as per the resolutions made on 16<sup>th</sup> December 2013. The orders stated as follows:-

***“That in the meantime the Respondents’ resolution made on 16<sup>th</sup> December 2013 is stayed until further orders of this Court”.***

49. There have been no further orders made on this resolution. It is therefore my finding that the orders made by the Hon. J. Rika on 19<sup>th</sup> December 2013 still persist. This in effect I mean that the Claimant has never ceased being the Diocesan Bishop todate.

50. In the circumstances, of this case, I find that the Claimant has established his case and I make the following orders:-

***1. That the Claimant is still the Bishop ELCK Central Diocese and any decisions that had been made removing him from office are declared null and void.***

***2. Further that the Respondents can only remove the Claimant from office after following due process.***

***3. Given that the Claimant had been unfairly removed, he is entitled to all benefits of the office in terms of salary due and owing from 28<sup>th</sup> April 2014 todate.***

***4. The Respondent will pay costs of this suit.***

Read in open Court this 13<sup>th</sup> day of December, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimant – Present

No appearance for Respondents